

1 UNITED STATES BANKRUPTCY COURT

2 EASTERN DISTRICT OF NEW YORK

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5 In the Matter of:

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7 ETIENNE ESTATES AT WASHINGTON DC, Case No. 14-40786 (NHL)

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9 Debtor.

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15 U.S. Bankruptcy Court

16 271-C Cadman Plaza East

17 Brooklyn, NY 11201

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19 April 24, 2014

20 3:12 PM

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23 B E F O R E :

24 HON NANCY HERSHEY LORD

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: [7] Status conference

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3 Hearing re: [10] Motion for 2004 Examination filed by Mark
4 A. Frankel on behalf of First Central Savings Bank

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6 Hearing re: [11] Motion for relief from stay fee amount
7 \$176. Filed by Mark A. Frankel on behalf of First Central
8 Savings Bank

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25 Transcribed by: Jamie Gallagher

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P R O C E E D I N G S

THE CLERK: Matter numbers 31 through 33 in the case of Etienne Estates at Washington LLC.

THE COURT: Appearances, please.

MR. FRANKEL: Mark Frankel, Backenroth, Frankel & Krinsky, attorneys for First Central Savings Bank. And with me is Jeff Gangemi, who is State Court Foreclosure and Real Estate counsel.

MR. GANGEMI: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. KHODOROVSKY: Nazar Khodorovsky, trial attorney with the U.S. Trustee's office.

MR. DONOVAN: Ted Donovan and Kevin Nash, Goldberg Weprin for the debtor. With us is Johanna Francis (ph), principal.

THE COURT: Okay. So we have a status conference, we should probably should do first. And then we have a motion for 2004 exam, for which there's been a limited response or objection. And then we have a contested motion for relief from stay.

So why don't we begin with the status.

MR. NASH: Your Honor, in terms of the overall status of the case, this property, although it's styled in the name of Etienne Estates at Washington LLC, that's more historic than anything else. This is where Ms. Francis

1 lives with her son. And we filed the Chapter 11. The
2 property is subject to dispute with the lenders.

3 THE COURT: Historic? Not historic. Did you
4 transfer the deed?

5 MR. NASH: No, the deed's in the name of the
6 debtor.

7 THE COURT: Good, then they own it.

8 MR. NASH: Right. They own it.

9 THE COURT: They, the debtor. It's historic and
10 it's current.

11 MR. NASH: Right.

12 THE COURT: Next.

13 MR. NASH: And the issues really in the case, it's
14 a mortgage default. There's litigation and claims with the
15 lenders about the proper recording and filing of various
16 mortgages.

17 THE COURT: There's currently no litigation before
18 me on that issue. Right?

19 MR. NASH: Not directly. The motion to lift the
20 stay does touch upon those defenses.

21 THE COURT: Okay, but those would have to be
22 commenced by adversary proceedings?

23 MR. NASH: Yes, they would.

24 THE COURT: Ms. Katchan?

25 MS. KATCHAN: Yes. I understand.

1 THE COURT: It's done. But if you want to wait to
2 hear what we've done, I'm not going to interrupt this. Get
3 here on time. Okay. Sorry.

4 MR. NASH: So we did file the Chapter 11 because
5 of issues with the property. We do believe that there is a
6 light at the end of the tunnel in the sense that if Your
7 Honor will recall, Ms. Francis is the general partner of the
8 ARC buildings. And the ARC confirmed the Chapter 11 case
9 before Your Honor.

10 There is a shareholder -- not a shareholder
11 insider dispute with her father and -- who -- and her
12 father-in-law. And they're fighting over a pot of money of
13 approximately three and a half million dollars. She has
14 substantial claims in at arbitration. That is, under the
15 terms of the ARC plan is going to be dealt with first
16 through mediation and then through arbitration.

17 THE COURT: What's the status of the mediation?

18 MR. NASH: The status is the father wants to go
19 right to arbitration. Ms. Francis and Mr. Vinay (ph), they
20 want to do a mediation for --

21 THE COURT: What did the plan provide?

22 MR. NASH: It provides for mediation first and
23 then arbitration. It's before JAMS. I have not represented
24 Ms. Francis in the arbitration. I kind of stayed away from
25 it because --

1 THE COURT: Wait a minute, but the order of
2 confirmation that confirms the confirmed plan --

3 MR. NASH: Right.

4 THE COURT: -- the order that confirms the plan
5 states that it will be a two-step process and mediation --

6 MR. NASH: Two-step.

7 THE COURT: -- is first?

8 MR. NASH: The mediation is first.

9 THE COURT: Okay. That wasn't something that was
10 -- that you would decide, it's something that was stated?

11 MR. NASH: No, it was specifically -- it was --

12 THE COURT: So you have a confirmed plan with an
13 order of this Court that sets forth that mediation is first.
14 I don't know why there should be any issue then.

15 MR. NASH: Because the concept was to mediate
16 within a period of 60 days and then go to arbitration. It
17 took several months for all the sides to put their various
18 claims together so they can be in a process to even discuss
19 it and then to mediate.

20 So they got beyond that 60 day window, which they
21 all did on consent. And now because they're beyond the 60
22 day window, one side is saying no, I want to arbitrate now.
23 I don't want to mediate.

24 THE COURT: And this is -- and it's the pot of
25 money at the end of this dispute that has gone on forever.

1 MR. NASH: Yes, it has.

2 THE COURT: And apparently they can't even get to
3 figure out where they're going to resolve it, or how they're
4 going to resolve it, that everyone is supposed to take
5 solace in, including this lender, that this is how it's
6 going to all get resolved in this case?

7 MR. NASH: Well, eventually -- it is a sizable pot
8 of money. So --

9 THE COURT: I know.

10 MR. NASH: It's a sizable pot of money and what
11 complicates it is the family dynamic. And unfortunately,
12 that makes it more difficult than it should be.

13 THE COURT: Is the family dynamic such that the
14 other members of the family would see this property get
15 foreclosed before they would do anything?

16 MR. NASH: I can't comment for Ms. Francis'
17 father. But it is --

18 THE COURT: No, as attorney for the debtor, do you
19 think --

20 MR. NASH: What I --

21 THE COURT: -- that -- I'm not talking about Ms.
22 Francis now. Do you think that the family members,
23 including Ms. Francis and whoever, would see this property
24 be foreclosed or lost -- I know there's a long process for
25 that too, before they would kick in?

1 MR. NASH: Not from the debtor's point of view.

2 But her father is a different animal and he's a different
3 creature and he's a difficult man to deal with. So from our
4 point of view, we want to mediate. The other family
5 involved wants to mediate. We are pushing for a mediation.
6 We put a lot of work into getting those claims ready into a
7 readable, understandable form.

8 THE COURT: No, no, I know that. I'm just looking
9 at this property.

10 MR. NASH: We would like to save it.

11 THE COURT: Would they see this property be lost
12 before they would come together on how to solve the problem
13 of the lender?

14 MR. NASH: Would the father come together? I
15 don't know.

16 THE COURT: I don't know, whoever is involved.

17 MR. NASH: It's the father and the daughter. I
18 don't know.

19 THE COURT: All right.

20 MR. NASH: The father has a -- he's been a
21 difficult person to pin down in all these cases. He comes
22 and goes as he likes. He's had several different attorneys
23 involved in these cases. And he -- the relationship is as
24 at a lower ebb as I can think of it. But there is still a
25 father/daughter relationship. There's a lot of money here.

1 There's a grandchild involved on both -- for both of these
2 men. There's the father-in-law and the father. There's a
3 grandchild that lives in this house.

4 So these are things that I would hope at the end
5 of the day they would put these issues aside and do what's
6 better. If they do nothing else in the case, they should do
7 what's in the best interest of the grandson. But that is
8 for reasonable people to deal with. I don't think the
9 father has been reasonable. He's been difficult to deal
10 with. Ms. Francis is trying to survive, have a place for
11 her son to live, and to be able to restart her life.

12 Now, the good thing is that there are -- there's a
13 lot of money to fight with here. And so there's money at
14 the end of the tunnel. Unfortunately, we couldn't make a
15 deal with the lender before the bankruptcy, but there was --
16 there were certainly the elements of a deal in place. It's
17 a cash flow issue for Ms. Francis.

18 THE COURT: Well, let's not get to their motion
19 yet. I want a status in general.

20 MR. NASH: Right. So my goal here is to -- and
21 I'm going to get involved. I told Mr. Frankel it's time
22 that I -- I stayed away because I was worried about a
23 conflict, but I see that this is going to infect this case,
24 so I'm going to get involved in the arbitration/mediation
25 process and see if I can bring it to a quicker conclusion.

1 There's a lot of money there. If we're able to
2 get, you know, even a third of that money, it deals very
3 nicely with these issues here. And we believe that Ms.
4 Francis is entitled to more than that.

5 So with that, I -- we're trying to put together an
6 adequate protection number that we can live with, at least
7 in a short term, while we sort out these issues. But this
8 mortgage situation is something -- you know, that we're here
9 because she wants to protect where she lives. And that's,
10 to me, is --

11 THE COURT: Well, we're going to get there.

12 MR. NASH: Right.

13 THE COURT: I have a lot of concern. Okay.

14 MR. KHODOROVSKY: Your Honor, Nazar Khodorovsky
15 for the U.S. Trustee.

16 In many ways, this case is off to a good start.
17 In some ways, it is not. It's off to a good start in a
18 sense that it has provided documents requested by the U.S.
19 Trustee. It created the initial debtor interview, meeting
20 of creditors, filed operating reports. That's all good.

21 But there's still several concerns. One concern
22 is that no retention application has been filed for any
23 professionals. Also, Your Honor, in addition to a -- it's
24 not just that they haven't been filed, not even drafts have
25 been sent to the U.S. Trustee.

1 Additionally, Your Honor, there's a question as to
2 even if there is to be an adequate protection arrangement,
3 what would be the source of the funding because if you look
4 at the present operating reports, I know they're for a
5 fairly short period, but right now, unless, you know, the
6 numbers are substantially favorable to the debtor, there
7 needs to be really some showing where the money is going to
8 come from.

9 THE COURT: Well, let me see if I understand. Let
10 me ask you this on retention. Is there going to be an issue
11 as to the fact, as I understood, I guess, the -- in reading
12 the reply which took me to the 341 meeting transcript, that
13 one of the tenants in the building -- in this property is
14 ARC. Is that the testimony?

15 MR. KHODOROVSKY: I think -- well, I don't -- Your
16 Honor, I think ARC definitely uses this property as its
17 address.

18 THE COURT: Okay. Well, to the extent that ARC
19 uses the property for whatever reason and ARC is or is not
20 paying anything and what he -- what is the debtor's counsel
21 going to do when the debtor's counsel who represents ARC is
22 going to have to sue ARC in order to get, for instance,
23 rent. It's a hypothetical at the moment. But have you
24 given that any thought?

25 MR. NASH: Yes, Your Honor. The reason why the

1 application has not been finalized is because there's -- a
2 lot of these (indiscernible) type issues, conflict issues
3 that are more -- they're technical because the ARC case is
4 closed. There's been claims asserted by Ms. Francis through
5 her various companies concerning rent. That's one of her
6 claims as part of the arbitration.

7 So -- but I have to lay it out in clear terms for
8 the U.S. Trustee and for Your Honor. So I've been working
9 on my own declaration. I happen to be working on it today.
10 I will finalize it in the next --

11 THE COURT: So that -- I mean, that's somewhat of
12 an explanation. And it may be at the end of the day this is
13 going to be problematic. I don't know.

14 MR. NASH: It may be, Your Honor.

15 THE COURT: I'm just throwing that out.

16 MR. NASH: But it's something we're concerned and
17 so it's not a formality of the retention. It's somewhat
18 complicated.

19 THE COURT: I mean, obviously your learning curve
20 and what you know about this family and this case is
21 tremendous. And to that extent, there's a great benefit to
22 the estate. And unless -- as I said, unless you figure out
23 a way by which you can farm out to another -- other counsel,
24 you know, when those issues come up, issues where you would
25 have to basically, you know, go after a party you've

1 previously represented.

2 MR. NASH: Which is really -- has a confirmed
3 plan. They're only fighting over money. So the money that
4 they're fighting over, whether it's directly or indirectly,
5 it's the same insider affiliate disputed money.

6 THE COURT: No. But fighting over money is one
7 thing and then this is an ongoing issue with respect to
8 rent.

9 MR. NASH: No, ARC really -- ARC has sold its
10 property and it has liquidated and consummated its plan.
11 With -- the rent claim is the accrued rents that were
12 owed --

13 THE COURT: Okay. So ARC no longer operates?

14 MR. NASH: No longer operates.

15 THE COURT: Okay. So that would have -- and that
16 occurred before this filing.

17 MR. NASH: Right.

18 THE COURT: Okay. So ARC going forward is not a
19 tenant?

20 MR. NASH: No.

21 THE COURT: Okay.

22 MR. KHODOROVSKY: Your Honor, but there's other
23 corporations owned by Ms. Francis are tenants.

24 THE COURT: I understand. As is Ms. Francis
25 herself a tenant, I think.

1 MR. KHODOROVSKY: Well, Your Honor, the question
2 as to whether she is a tenant or not is an interesting
3 question because the amended -- the Schedules B and G that
4 were fairly recently filed don't, and I just -- let me just
5 open it -- turn to Schedule G. They don't list any tenants.
6 Schedule G lists no tenants at all.

7 THE COURT: Well, again, that's going to be part
8 of this dispute. All right. Anything else on status?

9 MR. KHODOROVSKY: Not at this point, Your Honor.

10 THE COURT: Okay. So we'll take an adjourned date
11 on status later on. I want to hold off on the 2004 exam
12 motion, Mr. Frankel. Well, let me ask you this, Mr.
13 Frankel, the -- the way I see this right now is as to
14 certain issues we have -- or as to a lot of the issues we
15 have a contested matter now. To the extent that we have a
16 contested matter, I would do a contested scheduling order
17 and allow for discovery. And that, in many ways, would --
18 there are enough -- it seems to me there are enough issues
19 in this contested matter.

20 It's probably large enough as far as figuring out
21 rental income, and entities, and who owes what, and whether
22 there's been -- what the relationships are and all of that,
23 that it -- interestingly enough, it might be more difficult
24 for the debtor to oppose the requests you're making in
25 discovery of that contested scheduling order than it would

1 be in a 2004. 2004 is a fishing expedition, okay? But it's
2 a fishing expedition related to the debtor and the debtor's
3 financial affairs. And it just -- this may be an unusual
4 situation where your 2004 expansiveness is actually not as
5 expansive as your discovery would be in this contested
6 scheduling order because there were so many issues on both
7 sides. So I just threw that out as a thought.

8 MR. FRANKEL: I understand. I've been speaking to
9 debtor's counsel and I think that on the discovery point, we
10 will probably be able to get discovery going without needing
11 that decision to be resolved immediately. My idea was that
12 let's first find out what they're going to give us because
13 getting anything in discovery is often difficult. And then
14 we'll look at it and see whether we need more.

15 And from what Mr. Donovan told me the debtor is
16 willing to give and the affiliates are willing to give, it
17 should get us most of the way there, if not all of the way
18 there. But we won't know until we find out.

19 THE COURT: Right. And I understand that part.
20 What I'm saying is that I'm -- if we do a contested
21 scheduling order today with discovery deadlines in there,
22 then that in my mind usually -- again, we don't have an
23 adversary proceeding. So -- and you haven't commenced an
24 adversary proceeding. You have commenced this motion which
25 becomes a contested matter. Whether or not that stops the

1 2004 one might argue or not, I'm just suggesting that it
2 might be a more efficient way to control this situation.
3 Because if we -- if the discovery were done within the
4 contested scheduling order, then off on a 2004 exam. That
5 was my thinking.

6 MR. FRANKEL: I offered to serve a subpoena if
7 that would make it easier for the debtor. I mean, we're
8 not --

9 THE COURT: Well, I'm not -- again, I'm talking
10 about form now, not substance.

11 MR. FRANKEL: Yeah, I understand.

12 THE COURT: So let me -- let's -- I'm going to put
13 that aside when we get to the motion and see what the
14 contested issues are because again, it seemed to me that
15 some of the opposition, you know, related to what -- first
16 of all, five years is not a particularly long time,
17 particularly when state law has a reach back of six years.
18 So the five years didn't trouble me.

19 As far as how many entities and all of that, it
20 seems to me that the extent that these entities have any
21 relationship to this property or had any relationship to
22 this property, then in the contested scheduling order
23 related to this motion it's fair game. Whereas, again, it
24 might -- they might, you know, try to argue that -- and then
25 it becomes a different issue for me whether or not it's

1 within 2004, which is more focused on the debtor. So that
2 was a thought I had.

3 All right. Let's go to the motion and it's your
4 motion.

5 MR. FRANKEL: Okay. Well, Judge, after listening
6 to the debtor's presentation on the status conference, the
7 basic problem here is that the debtor sees this as Ms.
8 Francis' home rather than as an LLC entity that has a
9 responsibility to its creditors and that it's not the same
10 thing as a homeowner. And that is why nothing is being
11 paid, why there's no concept of cash collateral. The debtor
12 just pays what it wants to pay and then deems it to be in
13 lieu of rent without any judicial oversight or consent of
14 the lender.

15 And I'm just thinking that if a trustee -- if this
16 was a case where there was a trustee involved, that would --
17 none of that would happen. And that's how you can
18 graphically understand the difference between this being a
19 homeowner and this being an LLC that got a commercial loan.
20 And we want this to be like a regular case where there's
21 someone collecting rent, throwing out non-paying tenants,
22 paying the bills, and giving the excess to the secured
23 creditor. And that's not going to happen because there's no
24 acknowledgment that this is anything but someone's house.

25 THE COURT: Well, why do you need the

1 acknowledgment that it's a commercial loan? I mean, is
2 there something I'm missing as to why you need that
3 acknowledgment as opposed to you need the property to be --
4 I mean, I understand why you need everything else, but you
5 do have this issue of -- you do have this issue of having, I
6 guess, provided a home equity loan. (Indiscernible). Maybe
7 that's a red herring as to whether it changes, that maybe
8 it's a combined thing. But why -- I just didn't understand
9 why you seem to be focused on some acknowledgment that it's
10 a commercial loan. Why don't we just focus on the fact that
11 it's a loan and it's not being serviced?

12 MR. FRANKEL: That was the point I tried to make
13 in the reply.

14 THE COURT: Okay.

15 MR. FRANKEL: I didn't mean to dilute that point
16 by my comments.

17 THE COURT: Well, you know, and again, figuring
18 out if this falls within a single asset real estate case
19 seems to me to matter. I think it's an issue. But what I
20 read -- what troubled me before I read your reply, I got up
21 and I chatted with my law clerks. And I said, well, wait a
22 minute. How come Ms. Francis is not paying rent? And then
23 I got your reply and it says, "How come Ms. Francis is not
24 paying rent?"

25 So I've got a problem with that. And again, you

1 can't -- if you're going to be -- if you're going to utilize
2 corporate vehicles, which is perfectly appropriate in this
3 land, then you have to recognize the gift -- you know, you
4 can't have it both ways. You have to recognize that the
5 corporate entity is a separate, distinct entity and -- I
6 mean, for instance why wouldn't a Chapter 11 debtor in
7 possession or trustee have a potential fraudulent conveyance
8 action against anybody who's been there and hasn't paid any
9 rent for the past? Aside from paying past rent. People are
10 getting -- are people getting things for nothing?

11 And to the -- so we need to parse this out.
12 Obviously this is a building, whether it's for seven, or
13 four, or three, or six is obviously an issue of fact of
14 who's in there. But more than that, whatever it is, whether
15 it's for seven, or four, or six, or whatever -- however it
16 stands now, there is a market value for what this property
17 could be rented for. And if that equivalent is not being --
18 if it's not being obtained, they have a reason to walk,
19 besides the fact that they haven't seen any payments in a
20 very long time.

21 So what is the adequate -- where are we with
22 adequate protection? I mean, I read your motion. I mean, I
23 -- Mr. Frankel is still up here, Mr. Nash. So hang on a
24 minute.

25 MR. NASH: Okay.

1 MR. FRANKEL: Your Honor, we --

2 THE COURT: I don't need to cut you off on any
3 presentation you have. That was --

4 MR. FRANKEL: We suggested based upon an old 2011
5 analysis that was done by an appraiser back then that the
6 monthly rent should be -- I believe it was 11,750 and the
7 expenses are a few thousand. And there's 7,900 left over,
8 which is less than six percent interest on the mortgage.
9 And that's what we suggested would be a fair amount to pay
10 in lieu of --

11 THE COURT: What was the -- what was the mortgage
12 payment?

13 MR. FRANKEL: Six percent, which is about 9,000 a
14 year -- 9,000 a month, 108,000 a year on about a million
15 eight.

16 THE COURT: Do I have to have a litigation? Don't
17 shake your head. Speak through your counsel. It should not
18 be a disputed issue as to what the monthly mortgage payment
19 was at some point prior to filing, what it should have been.
20 Okay? You say it was about --

21 MR. FRANKEL: I've already attached all the loan
22 documents. We attached the affidavit and the little
23 calculation by the loan officer that it's six percent. And
24 six percent by my calculation on a million eight comes out
25 to about 9,000 a month.

1 THE COURT: Well, the argument may be on the
2 million eight.

3 MR. FRANKEL: Excuse me?

4 THE COURT: The argument may be -- is the argument
5 about the -- on the million eight?

6 MR. FRANKEL: The million eight is principle. It
7 was --

8 THE COURT: All right.

9 MR. FRANKEL: -- acknowledged in the forbearance
10 agreement.

11 THE COURT: Okay. So all right. And this amount
12 would be less than that.

13 MR. FRANKEL: Yes, it's 1,000 -- \$1,100 less than
14 that. And we think that that's less than what would be --
15 it's still -- the obligation is still going to be growing at
16 that number but it is a fair rental value. It's very
17 upscale property and expensive property, and it generates
18 rent. And I know that it's the debtor's home but --

19 THE COURT: Well, but again, if that's disputed it
20 will be part of our contested matter and we'll do an
21 evidentiary hearing that's separate -- I mean, there's two
22 issues here. There's the value of the property. There's
23 the value of the rental.

24 MR. FRANKEL: Right.

25 THE COURT: You know, you don't have to -- all you

1 have to do is read any newspaper, or turn on New York 1, or
2 turn anything on to know this is a Brooklyn property, right?
3 Brooklyn is hot. Nobody can afford to live in Brooklyn.
4 They're moving out of Brooklyn to live in Manhattan.

5 So I don't know if -- again, I don't know if this
6 property is part of that, but again that's -- everyone knows
7 that. This is where -- this is the place to be.

8 MR. FRANKEL: Now, I understand that the debtor
9 principal probably can't afford to pay that. And that's a
10 problem and the --

11 THE COURT: Well, that's why I asked that question
12 in status because it seems to me that's probably true. And
13 I guess the question is --

14 MR. FRANKEL: And I have a very simple solution to
15 that. Just lift the stay. The property is not going to be
16 sold in Kings County Court for a year anyway, by which point
17 we'll find out what happened in the arbitration and either
18 this case will be confirmed or it will be dismissed or
19 something else will happen. But it's not going to hold up
20 -- there's no reason to hold us up when we're not going to
21 be interfering anyway.

22 THE COURT: No problem -- the problem is in cases
23 where there are family disputes. And again, I had ARC only
24 for the very end. ARC had been -- right, Judge Fellows
25 case. So I got it at the very, very end. So I did not have

1 the -- either the history or the histrionics or whatever you
2 want to call them.

3 But the problem with family disputes is as lawyers
4 when we deal with commercial issues, and judges or whatever,
5 we tend to think that people -- we hope or we advise our
6 clients to think logically. That people will do things that
7 are reasonable and rational and in their interests. And
8 when you have family disputes, I'm sure I don't have to --
9 I'm sure you've had your share of them in your firm
10 representing it, people don't always act that way. They act
11 out of a whole different set of -- a different toolbox. And
12 that's why I asked the question as to whether or not family
13 members and everybody else, while they're arguing in this
14 mediation/arbitration would let this property go down. And
15 Mr. Nash really couldn't answer that because I guess there
16 is a certain unpredictability to how family members treat
17 each other when they are at war.

18 So but you should -- your client should not be the
19 victim of that.

20 MR. FRANKEL: Yeah, we're collateral damage.

21 THE COURT: I think -- I have a sense that there's
22 been a lot of that in the ARC case and now it's continuing.
23 It's spilling over.

24 Mr. Donovan, Mr. Nash, obviously on the issue of
25 lack of equity and property not necessary for an effective

1 reorganization, that's an evidentiary hearing, a contested
2 matter. You get discovery and we'll do that. On the issue
3 of single asset real estate and whether you'd be -- your
4 requirements would be a different section of 362, that
5 sounds like it's an evidentiary hearing and a contested
6 matter as to whether or not that's a single and an operation
7 of law -- application of law by me.

8 But lack of adequate protection, which is its own
9 independent basis is a ground for me to lift the stay and to
10 do it right away unless you offer what I think is reasonable
11 adequate protection or at least on some interim basis
12 subject to being increased or decreased depending upon what
13 -- where the case takes us.

14 MR. NASH: And I agree with Your Honor. This is
15 cash flow and Mr. Frankel hit on it. It's not a question
16 that we're oblivious to the obligation. We know we have to
17 pay adequate protection. We do believe -- we offered \$3,000
18 a month plus pay the current taxes, which would effectively
19 be a total payment above \$4,000 a month on an annualized
20 basis.

21 Mr. Frankel thinks the property is worth more, but
22 his own appraisal -- his drive by appraiser has a fair
23 market value rental of \$6,000. So we went up from three to
24 -- and we had a conversation, Judge. They were at six --
25 and I don't -- okay. They were at six in their appraiser, I

1 was at three. I think we can get to a middle ground. And
2 what we're talking about is a 90 day period of time.

3 And, you know, and in one sense, they want it to
4 be a commercial loan and I'm not saying they're not entitled
5 to adequate protection, but they do have a problem in the
6 sense that they gave a home equity loan. By their own
7 documents, it's a home equity loan. And there is a body of
8 law that says that a homeowner doesn't have to pay rent.
9 There is a body of law that says that.

10 Now, I know that the property is in the name of
11 the LLC, but there's -- there is a body of law that says
12 that. And we also know adequate protection is to protect
13 them against the diminution in value during the pendency of
14 the Chapter 11.

15 And Your Honor is right. Brooklyn is hot. And
16 it's -- these properties are not going down. That doesn't
17 mean they're not entitled to adequate protection, but there
18 is a flip side to that. And before we get into esoteric
19 issues of whether this is a home, a residence, or if she
20 rents from herself because it's in the name of an LLC, I
21 think what we should try to do is to get a number that she
22 can live with because we do know if there's an adequate
23 protection payment and she can't make it, then she has a lot
24 of trouble.

25 And this is not a question of not recognizing the

1 need to do it. She does have a cash flow issue at this
2 point in time. There's no doubt about it. But she's got to
3 be able to pay something and there is a light at the end of
4 the tunnel in that arbitration. So I've got to get the
5 right number.

6 THE COURT: Unless -- again, unless you're willing
7 to pierce the corporate veil right now, it is not she.

8 MR. NASH: Okay.

9 THE COURT: Okay? It is not she.

10 MR. NASH: I agree. That's fine. But by the same
11 token --

12 THE COURT: It is the debtor.

13 MR. NASH: Right.

14 THE COURT: The debtor is a Chapter 11 fiduciary
15 and in many ways by doing that, by voluntarily putting
16 yourself in that position, you now have a whole host of
17 obligations separate from dealing with a State Court Judge
18 on foreclosure as to why you're supposed to, you know,
19 maximize assets and comply with the fiduciary obligation,
20 which would be to collect rent, and to evict anybody who
21 can't pay and get a paying tenant.

22 Now, I'm not a heartless Judge. I don't want to
23 put people on the street. I really try very hard -- the
24 other day, I -- well, last month I took somebody off the
25 street literally and put them back in their apartment. So

1 that's not what I'm about. But I don't think you can --
2 again, I don't think you can have it both ways. If you're
3 going to create corporate entities and you're going to
4 utilize the system, I think you have to act as a fiduciary.
5 Otherwise, you're really opening yourself up it seems to me
6 for an application for a Chapter 11 trustee, assuming one
7 could be paid.

8 MR. NASH: Understood. We don't need any more
9 costs. So perhaps we can take a couple of -- ten minutes
10 and see if we can get a 90 day monthly payment between 3,000
11 and their number that we can -- just for 90 days. Not
12 forever because there are issues here we can look at.

13 THE COURT: Well, at the same time during those 90
14 days, we will be -- you'll be conducting discovery, and
15 you'll be dealing with the issues or not?

16 MR. NASH: Right.

17 THE COURT: What's --

18 MR. NASH: We'll be dealing with the issues.

19 THE COURT: So we'll have a contested scheduling
20 order and --

21 MR. NASH: Nothing is going to stop. But we've
22 just got to get us from here to there in a fair manner.

23 THE COURT: Take a second call.

24 MR. NASH: Thank you.

25 MR. KHODOROVSKY: Thank you, Your Honor.

1 (Recessed at 3:45 p.m.; reconvened at 4:12 p.m.)

2 THE CLERK: Second call in the case of Etienne
3 Estates at Washington LLC.

4 MR. NASH: Your Honor, we did reach an interim
5 resolution of this, starting May 1 for 90 days, and we'll
6 revisit it after 90 days. The debtor will pay adequate
7 protection of \$5,000 per month without --

8 MR. KHODOROVSKY: Your Honor -- Your Honor, Nazar
9 Khodorovsky for the U.S. Trustee.

10 I would like Mr. Nash to discuss what's going to
11 be the source of the funding for this \$5,000. Thank you,
12 Your Honor.

13 MR. NASH: Ms. Francis will be the source of the
14 funding.

15 MR. KHODOROVSKY: Will it be in the form of a loan
16 or a capital contribution to the debtor?

17 MR. NASH: It's a question. I haven't thought it
18 out that deeply, but I would consider it not a loan because
19 that will be another set of issues. It will be her -- if we
20 want to call it anything, we'll call it a capital
21 contribution.

22 THE COURT: What -- now, all right.

23 MR. NASH: I don't want to call it a loan
24 (indiscernible).

25 THE COURT: We know there's an issue as to who's

1 in there as a tenant and who's not, but I think even your
2 papers indicated that the entity Mismatch?

3 MR. NASH: Yes, it's Mismatch.

4 THE COURT: Okay. So does Mismatch generate any
5 income for which they can pay adequate protection? I
6 understand that there are other things that get paid, other
7 expenses, but is that not clear or is that part of the
8 bigger problem going on?

9 MR. NASH: It generates certain income. It's not
10 a lot of income. I look at Mismatch as being the equivalent
11 of Ms. Francis. That's her personal services company. So
12 when I say Johanna Francis, I'm saying Mismatch. To me,
13 they're one in the same. Technically, they're not.

14 They will have to come up, whether it's Johanna
15 Francis, Mismatch, the debtor is going to have to write a
16 check for \$5,000 a month.

17 THE COURT: Okay. And that will not be a loan,
18 we've heard.

19 MR. KHODOROVSKY: I understand, Your Honor, but I
20 would like to then respectfully request that any capital
21 contributions or whatever rent, whatever form this takes be
22 properly reflected on the monthly operating reports and
23 properly characterized as an appropriate transaction. Thank
24 you, Your Honor.

25 THE COURT: Okay, Mr. Nash?

1 MR. NASH: Yes.

2 THE COURT: Okay. So let's go to -- for a minute
3 to the motion for relief and \$5,000 per month for May, April
4 -- May, June, and July. I've been sitting here too long
5 today. May, June, and July, correct?

6 MR. NASH: Yes.

7 THE COURT: Okay. Let's just switch gears for a
8 minute. I was going to fill out and will fill out a
9 contested matters scheduling order.

10 MR. FRANKEL: Your Honor, before we move on, can I
11 clarify a couple of additional --

12 THE COURT: Sure.

13 MR. FRANKEL: This \$5,000 per month is not in lieu
14 of but in addition to paying the property expenses,
15 including tax, water, and sewer charges as they come due.
16 And the failure to pay the 5,000 or the tax, water, and
17 sewer will give rise to a trip wire which would trigger the
18 automatic stay in the form of -- we'll make a conditional
19 order to incorporate that concept that payment is due. If
20 it isn't paid and notice of --

21 THE COURT: No. I won't do that. I mean, again,
22 we're going to have a whole contested matter here on --

23 MR. NASH: Right.

24 THE COURT: -- these issues. I -- maybe that -- I
25 hope that doesn't blow your deal. But if you're saying you

1 don't come back to me?

2 MR. FRANKEL: No, no. I'm saying we come back
3 saying that the payment wasn't made.

4 THE COURT: Right.

5 MR. FRANKEL: And therefore, the stay should be
6 lifted based --

7 THE COURT: It's another, you know, part of your
8 arsenal, right? But it's not going to be an automatic
9 trigger to lifting the -- an automatic trigger to stay
10 relief. And maybe we're talking about the same thing.

11 You're not suggesting it's automatic. You're
12 suggesting that if there's a failure to make an adequate
13 protection payment, you're going to let me know and that's
14 going to be, presumably, you're going to argue a really good
15 reason for me then to lift the stay.

16 MR. FRANKEL: Well, we would like to make it
17 automatic that --

18 THE COURT: I'm not going to do that. It's too
19 early in the case and there's too many -- I mean, that's --
20 I'm not prepared to do that today. I mean, I understand
21 that's your stipulation, but it's adequate protection. And
22 if you fail to make adequate protection, again, that's an
23 argument for why I should not continue the stay. Right?

24 I mean, you're going to be in the middle of this
25 anyway and you're going to be back here. So if there's not

1 -- if there's a failure to make an adequate protection
2 payment, you can be back here on an emergency basis for a
3 hearing and I'll give you that -- we're going to adjourn
4 this. So you'll take whatever the adjourned date is and
5 we'll bring it back closer to the problem.

6 MR. FRANKEL: I think we need a consequence to
7 non-payment. Otherwise, why pay?

8 MR. NASH: Well, you're going to lose the
9 property. You know, you can't go into Court and say I made
10 a deal. It's \$5,000. I didn't pay.

11 THE COURT: Well, first of all, this deal has got
12 to be reduced to a writing, a stipulation that I am going to
13 so order, okay? So that everyone is clear on what it is
14 we're agreeing to. And it's without prejudice. Your taking
15 these payments is without prejudice to your motion. And but
16 the failure to make it -- make a payment -- I mean, you
17 know, what happens if something happens at the property and
18 the money is necessary to protect the property some other
19 way? I don't know, there's a boiler issue. You know, the
20 roof caves in. That something happens and the property --
21 again, to preserve the property, the money is needed. I
22 don't believe in automatic triggers, again, under the
23 circumstances of this case, so early on in this case when
24 there are so many other determinations to make like what's
25 the value.

1 You know, there is this -- again, there is a
2 potential source of funds in this other situation, but I
3 made it clear that you should not be the one who has to sit
4 out there not getting paid while this -- while these family
5 members continue to fight.

6 But by the same token, I think that this is a
7 situation where, believe me, if there's -- if they've agreed
8 to adequate protection and they fail to make a payment, you
9 will have a very sympathetic ear. But I want to know if
10 there's a reason why they didn't make the payment. So
11 rather than you become the Court, I want to continue to be
12 the Court and determine whether or not the stay should be
13 lifted at that point.

14 MR. FRANKEL: I understand, Your Honor. In
15 addition, we are going forward with the discovery and
16 including --

17 THE COURT: Right. Well, that's what I'm going to
18 do right now. And I'm going to do -- again, formalize it so
19 we're not -- we need to stay formal.

20 Okay. We need to pick a date in the future which
21 I'll fill out from when we're going to hear this -- an
22 evidentiary hearing. I'm going to give you until -- you've
23 conferred already, but I'm going to give you in accordance
24 with 9014(c), direct you under Rule 26 to confer, and then
25 file a certification.

1 Today is -- I'll have you do that by May 9th. How
2 long do you want for discovery?

3 MR. NASH: Two months?

4 MR. FRANKEL: Yes.

5 THE COURT: Okay. So discovery will end June
6 27th, is that all right? And then I -- a week -- well, two
7 weeks later, I'm going to require a brief statement
8 summarizing your positions, the list of intended witnesses
9 and exhibits. I'll give you two weeks from that, from June
10 27th. That would take us to July 11th.

11 And then this only takes us through the end of
12 July. It seems to me that we have to have this hearing in
13 -- this evidentiary hearing in July and allowing enough
14 time, which we're estimating now to be, I don't know, half a
15 day, a day, any ideas?

16 MR. NASH: A day -- no more than a day.

17 THE COURT: All right. I'll set aside a day --
18 let's pick a day in July. After the 11th.

19 MR. KHODOROVSKY: Your Honor, the only thing I
20 would like to ask of the status conference -- the next
21 status conference should be held before this evidentiary
22 hearing in July.

23 THE COURT: Okay, yeah. And again, Mr. Frankel,
24 if you don't get a payment within -- I don't know if you're
25 going to -- if there's going to be a date and then -- I

1 mean, you're not going to make them send cure notices and
2 stuff presumably. There's a date. You will contact
3 chambers and I will put this on immediately because it will
4 be very, very serious. And if there isn't an explanation
5 for why they haven't made the payment, you may get your
6 relief then and there. But I can't -- I don't want to
7 decide that today.

8 MR. FRANKEL: Okay.

9 THE COURT: Do we -- we know for sure -- hold on a
10 minute. Okay. Didn't we already put stuff on for the 15th?
11 Yesterday? Did we put a lot on?

12 THE CLERK: I don't remember.

13 MR. NASH: I do have a trial on the 15th, Judge.

14 THE COURT: Okay. July 17th?

15 UNIDENTIFIED SPEAKER: Kevin, that's the day after
16 -- you've got a two-day trial the 15th and 16th.

17 MR. NASH: Yeah. Judge, if -- I do --

18 THE COURT: Okay. Okay. I'll go -- I'll do it
19 another time. Okay. July 23rd.

20 MR. NASH: Thank you, Your Honor.

21 MR. KHODOROVSKY: At what time, Your Honor?

22 THE COURT: 10:30. July 23rd. A hearing on the
23 matter on July 23rd at 10:30. And I won't put anything else
24 on that day. Obviously if you resolve the matter or you --
25 that's not a date that's going to work, you'll let me now as

1 soon as you know so I can free it up.

2 MR. NASH: Thank you, Your Honor.

3 THE COURT: Or go to the beach.

4 MR. FRANKEL: Thank you.

5 MR. KHODOROVSKY: Your Honor, I think there's also
6 a need for a next status conference in this case.

7 THE COURT: Yes. Hold on, I'm going to get to it.
8 So Mr. -- the motion for relief from stay, I'm going to --
9 even though I did the contested matter scheduling, I'm still
10 going to adjourn it. I'm going to continue the stay based
11 upon your making the adequate protection payments. And I'm
12 going to adjourn it to a date -- when do you want to come
13 back for status?

14 MR. KHODOROVSKY: I think early June.

15 MR. NASH: May 29th?

16 MR. KHODOROVSKY: That works.

17 THE COURT: Okay. So I'm going to put the motion
18 for relief from stay on -- continue it to May 29th. You'll
19 give me -- you'll be able to give me a nature of a status on
20 how discovery is going. Status is May 29th.

21 MR. KHODOROVSKY: At what time on the 29th of May,
22 Your Honor?

23 THE CLERK: 2:30, Judge.

24 THE COURT: And then what are we going to do with
25 -- what do you want to do with the 2004 exam motion? Do we

1 want to hold it in abeyance seeing what happens with the
2 discovery?

3 MR. FRANKEL: Yes. There's just one thing I
4 wanted to mention. I think that Mr. Donovan and I can work
5 it out. We've never had to go to court over a -- or with
6 Mr. Nash over a discovery fight before.

7 MR. NASH: Thanks for including me there. I
8 appreciate it.

9 MR. FRANKEL: But one issue that I want to clarify
10 now because it has been a historic issue in the case is that
11 we need to be able to get in to inspect the property. We
12 have not been able to do that in years.

13 THE COURT: Well, I -- you're going to -- I assume
14 you've got an appraisal.

15 MR. NASH: Right.

16 THE COURT: Are you planning to do your own
17 appraisal?

18 MR. FRANKEL: Yes. And there was testimony at the
19 341 meeting about conditions at the property. We need to
20 have an inspection.

21 MR. NASH: All right. We'll arrange for that.

22 MR. FRANKEL: Thank you.

23 THE COURT: Is that going -- that's what I'm
24 asking you. Is it an inspection and an appraisal?

25 MR. FRANKEL: Yes, we'll be doing both.

1 THE COURT: Okay. So you'll have an appraiser
2 with an appraisal on -- presumably for the hearing. And
3 then again if anybody was going to take discovery of anybody
4 else's expert, I didn't put a separate date in for that.
5 But I would urge you rather than make this more complicated
6 to create a separate date, as soon as you know who your
7 appraiser is and when you have an appraisal, if you could
8 exchange those documents.

9 MR. FRANKEL: Certainly.

10 THE COURT: So if either one of you wants to do a
11 deposition of the other's appraiser, you could do that.
12 Okay.

13 MR. NASH: Thank you, Your Honor.

14 THE COURT: I'm hoping that we won't need to do
15 that. Okay, so I'll carry the 2004 exam motion to the same
16 date?

17 MR. FRANKEL: Yes.

18 THE COURT: Okay.

19 THE CLERK: To the May date?

20 THE COURT: Yeah. And I'm going to enter this
21 order and I'm going to look for you to circulate a very
22 short stip with respect to the continuation of the stay
23 based upon the adequate protection payments. There -- how
24 it's -- the fact that there -- it also requires the
25 continuation by the debtor of paying the other items, and

1 the fact that Mr. Frankel's client can seek an expedited
2 hearing in the -- on immediate stay relief in the event that
3 there's a failure to make a payment or of either category.

4 MR. NASH: Okay.

5 THE COURT: All right?

6 MR. NASH: Yes.

7 MR. KHODOROVSKY: Your Honor, I would like to
8 request that the draft stipulation be circulated to the U.S.
9 Trustee.

10 THE COURT: Circulate it to the U.S. Trustee.

11 MR. KHODOROVSKY: Thank you, Your Honor.

12 THE COURT: Okay. All right. I think that's it.

13 (Chorus of thank you)

14 THE COURT: Again, this will be uploaded.

15 (Chorus of thank you)

16 THE COURT: And I encourage everybody to stay for
17 the 5 o'clock festivities, although I understand there's a
18 -- there's also something for Judge Lifland going on in
19 Manhattan.

20 MR. KHODOROVSKY: Yes, Judge.

21 THE COURT: Yeah, so I don't know. Whatever,
22 anyway. Good luck.

23 MR. NASH: Thank you.

24 MR. KHODOROVSKY: Have a good afternoon, Your
25 Honor.

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THE COURT: Did I do everything?
(Whereupon, the proceedings were concluded at 4:28
P.M.)

C E R T I F I C A T I O N

We, Jamie Gallagher, certify that the foregoing transcript
is a true and accurate record of the proceedings.

Jamie
Gallagher

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